SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 18 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 843

JAMES RICHARD BAKER,
Petitioner,

v.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit.

ROBERT J. O'HANLON,
RICHARD L. DALY,
605 Buder Building,
7 North Seventh Street,
St. Louis 1, Missouri,
and
GORDIAN S. BENES,
317 North Eleventh Street,
St. Louis 1, Missouri,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Petition for Writ of Certiorari	1
Opinion Below	1
Jurisdiction	1
Question Presented	1
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	10
Appendix	11
Opinion	11
Judgment	22

CITATIONS.

Cases:

Helwig v. U. S., 162 F. 2d 837	9
Kenion v. Gill, 81 U. S. App. D. C. 96, 155 F. 2d 176	4
Lott v. U. S., 218 F. 2d 675	4
Mellor v. U. S., 160 F. 2d 757	8
Morris v. U. S., 156 F. 2d 525	4
Mortinsen v. U. S., 64 S. Ct. 1037, 322 U. S. 369	8
Screws v. U. S., 65 S. Ct. 1031, 325 U. S. 91	4
Yoder v. U. S., 80 F. 2d 665	8

Statute:

18 U. S. C. 2421	1, 2

Federal Rules:

Rule 52B	3, 9

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

JAMES RICHARD BAKER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 20, 1962.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra) has not been reported as yet.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 20, 1962 (Appendix, infra), the Petition for a Rehearing denied on January 18, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether a jury is sufficiently instructed on the questions of specific intent and purpose on a violation of the White Slave Traffic Act, 18 U. S. C., Section 2421, wherein

the trial Court instructed generally on specific intent, but did not expressly charge that the unlawful, immoral purpose must be the dominant purpose of the transportation of a female in interstate commerce in order to justify a conviction under the Mann Act, did not differentiate between purpose and intent of the interstate journey, or advise the jury that if the journey was planned with no immoral purpose, no crime was committed, no matter what may have been done thereafter, or that it is the immoral purpose which renders such interstate commerce criminal, or that such intent must exist at the outset of the journey, and whether the Court's charge was thus so lacking in explanation as to be fundamentally erroneous under the Plain Error Rule of the Federal Rules of Criminal Procedure.

STATUTES INVOLVED.

18 U. S. C. 2421 provides:

"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

"Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of

prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

Rule 52 B of the Federal Rules of Criminal Procedure, 18 U. S. C. A.:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATEMENT.

Petitioner was convicted by a jury in the United States District Court for the District of Nevada under an indictment which charged that on or about September 19, 1959, James Richard Baker, did knowingly, willfully and unlawfully transport in interstate commerce a certain female, Carol Lou Thomas, from Tiller, Oregon, to Elko, Elko County, State and District of Nevada for the purpose of prostitution and debauchery in violation of 18 U. S. C. 2421.

Carol Lou Thomas met Baker in Elko, Nevada in June, 1959, while both were passengers on a bus. In September, 1959 Baker visited Miss Thomas at her home in Tracy, California and told her he was married but was getting a divorce. He asked her to go with him to Reno and marry him after the divorce (R. 11 and 15). When they reached Sacramento, California, Baker suggested that she could make money for him by being a prostitute (R. 17, 18). They then drove on to Tiller, Oregon, where they stayed at his home (R. 18) for three or four days. They then drove to Reno, Nevada where she had her hair dyed platinum blonde (R. 21), after which they drove to Elko, Nevada. Baker talked to the proprietor of Betty's D&D

Club and later reported that "she didn't have room for anybody, but he knew they did because they were always needing girls" (R. 23). They afterwards drove to Wadsworth, Nevada where Miss Thomas worked as a prostitute for four or five days. She made two or three hundred dollars which she turned over to Baker when he returned at the end of this period (R. 24-27). Baker took her to Winnemucca, Nevada next where she worked as a prostitute for four or five days and finally took a bus home to Tracy, California (R. 28-32). Baker called for her a day or so later and took her to Carson City, Nevada, where he arranged for her to work as a prostitute, then they traveled to Peoria, Illinois (R. 33-35), where she again worked as a prostitute at Pam Miller's house starting on November 1, 1959. On January 7, 1960 she could not work any more due to pregnancy and she returned to Oregon (R. 35-39).

At the trial the defendant offered no evidence.

He made no objections to the instructions given by the Court.

The jury found the defendant guilty and his punishment was assessed at five years imprisonment.

The Court below affirmed the conviction finding no errors or defect in the instructions affecting appellant's substantial rights, within the meaning of the plain error rule.

REASONS FOR GRANTING THE WRIT.

In a criminal case the Court must instruct on all essential questions of law involved, whether or not it is requested to do so. The Court should define the crime charged, and the elements, to the extent necessary to enable the jury to apply the law to the facts. Kenion v. Gill, 81 U. S. App. D. C. 96, 155 F. 2nd 176; Morris v. U. S., 9 Cir., 156 F. 2nd 525; Screws v. U. S., 325 U. S. 91, 65 S. Ct. 1031; Lott v. U. S., 218 F. 2nd 675.

In the instant case, the Court instructed the jury on intent as follows (pp. 154, 157, Reporter's Transcript):

"In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove act and intent beyond a reasonable doubt.

"The defendant is not on trial for any act or conduct not alleged in the indictment.

"With respect to lesser offenses, if it be shown that a person has knowingly committed an act denounced by law as a crime, intent may be presumed from the voluntary doing of the forbidden act, but with respect to major crimes, such as charged in this case, specific intent must be proved before there can be a conviction. Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct. A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose either to disobey or disregard the law, may be found to act with specific intent.

"An act or failure to act is done knowingly, if done voluntarily and purposely and not because of mistake or inadvertence or other innocent reason. Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which the act is done or omitted.

"Personal advancement and financial gain are too well-recognized motives for much of human conduct. These laudible motives may prompt one person to voluntary acts of good and others to voluntary acts of crime. Good motive alone is never a defense where the act done or omitted is a crime, so the motive of the accused is immaterial except insofar as evidence

of motive may aid in determination of intent. Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

"It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

"In determining the issue as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind. The law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. All evidence relating to any admission or incriminatory statement claimed to have been made by a defendant outside of court should be considered with caution and weighed with great care.

"These, ladies and gentlemen, are some of the general rules that apply in all criminal cases and should be of assistance to you in determining the credibility of the witnesses and the weight to be attached to the

testimony. The elements of the offense described in that portion of Section 2421 of Title 18 of the United States Code under which the defendant has been charged by indictment may be summarized as follows:

"(1) The willful and knowing transportation of a woman or girl (2) in interstate commerce as described in the indictment (3) for the purpose of prostitution or debauchery and other immoral purposes.

"You cannot convict the defendant in this case unless and until it has been established to the required degree that the defendant has committed the offense charged and each and all of the elements thereof which I have just given you. If, however, you are satisfied from the evidence that the Government has established to the required degree the existence of each and all of the elements of the offense charged, and that the defendant is guilty of the commission thereof, you should then not hesitate to find the defendant guilty."

Thus, intent and purpose were defined generally, but were not broken down into their constituent elements and made specifically applicable to the charge at hand. Using the District Court's own words (p. 157, Reporter's Transcript), these instructions "are some of the general rules that apply in all criminal cases . . ."

No distinction in the Court's instructions was made between immoral purpose harbored at the beginning of the journey and one arising during the transportation and being but incidental to its main purpose. It has generally been held that illicit sexual relations merely incidental to or consequent upon the interstate transportation of a woman do not constitute a violation of the Act where the transportation was undertaken for a proper and legitimate

purpose and without relation to an indulgence in immoral practices. Yoder v. U. S., 10 Cir., 80 F. 2nd 665, and the many cases reviewed therein. Yet here the issue of legitimate purpose for the particular transportation was not submitted to the jury in the Court's charge.

The instructions did not advise that the immoral purpose must be the dominating purpose of the trip. In Mortinsen v. U. S., 64 S. Ct. 1037, 1040, 322 U. S. 369, the Supreme Court stated:

> "The Statute aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes. To constitute a violation of the act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities. An intention that the girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intent or motivation, immoral conduct during or following the journey is insufficient to subject the transportation to the penalties of the act."

In Mellor v. U. S., 160 F. 2nd 757, the Court did not interpret the Mortinsen case as holding that an instruction on illicit purpose in a Mann Act prosecution must use the precise words "dominant motive," but that it was sufficient that the District Court charged that the Government was required to prove the immoral purpose to have been "not a mere incident, but rather an efficient purpose prompting and impelling the defendants to the transportation of the girls." The significance being, however, that the instructions in their entirety made it plain to the jury that transportation for an immoral purpose was an essen-

tial element of the offense, while in the present case this issue was not sufficiently set forth.

Again, in Helwig v. U. S., 162 F. 2nd 837, the District Judge in his instructions to the jury did not expressly charge that the unlawful immoral purpose must be the dominant purpose of the transportation in order to justify a verdict of guilty, yet his instructions were equivalent thereto. He told the jury that the statute makes intent and purpose an element of the crime; that if the journey was planned with no immoral purpose, no crime was committed no matter what may have been done thereafter. He told the jury that it is the immoral purpose which renders such interstate commerce act criminal, and that to constitute a violation of the statute there must be such intent at the outset.

In the present case nothing was stated to the jury about "dominant purpose" or anything to its equivalent. Under the general instructions given on intent the jury could have believed that proof of the acts of the woman after the transportation alone was sufficient in itself for a verdict of guilty. Or they could have believed that the immoral intent was present, but that the transportation was not for this purpose.

The record reveals that the stated motive at the beginning of their trip from the girl's home in California was for the purpose of marriage (R. 10). If the jury believed this to be so, and this purpose carried through to the time when the parties left Tiller, Oregon, to go to Elko County, Nevada, no crime was committed, no matter what may have occurred thereafter. But the jury was not enlightened on this point by the Court's instructions.

Thus the Court's charge was so lacking in explanation of the offense charged and its elements as to be fundamentally erroneous and inadequate and comes under Rule 52 B of the Federal Rules of Criminal Procedure.

"Plain Error. Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the Court."

The issue is thus whether general instructions on specific intent in a Mann Act case are so encompassing as to enlighten the jury on purpose and intent in relation to the transportation in all its many ramifications.

The question is of importance in the administration of the rule which requires a Court to instruct on all essential questions of law involved in the trial of a particular criminal case. Is the Court's obligation satisfied in a Mann Act case by summarizing what the substantive count charged, principally be reference to the indictment, followed by a stating of general rules that apply in all criminal cases, or must there be a greater amplification and explanation of the elements of purpose and intention.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT J. O'HANLON,

RICHARD L. DALY,
605 Buder Building,
7 North Seventh Street,
St. Louis 1, Missouri,
and

GORDIAN S. BENES,
317 North Eleventh Street,
St. Louis 1, Missouri,
Attorneys for Petitioner.

APPENDIX.

Opinion.

United States Court of Appeals
For the Ninth Circuit.

James Richard Baker,
Appellant,

vs.

United States of America,
Appellee.

No. 17,937.
Nov. 20, 1962.

Appeal from the United States District Court
for the District of Nevada.

Before: Orr, Hamley and Jertberg, Circuit Judges

Hamley, Circuit Judge:

James Richard Baker was tried and convicted of knowingly transporting Carol Lou Thomas from Tiller, Oregon to Elko, Nevada, for the purpose of prostitution, in violation of the White Slave Traffic Act, 18 U. S. C., § 2421. He appeals, asserting that the trial court erred in admitting certain evidence, in failing to instruct the jury on certain points, and in erroneously instructing them as to other matters.

For the purposes of appeal the facts are established by the undisputed testimony of Miss Thomas. In the latter part of June, 1959, Miss Thomas met Baker in Elko, Nevada, while both were passengers on a bus. Baker got off at Reno, Nevada, but she continued on to Tracy, California, where she made her home with her sister and

brother-in-law. In August, 1959, Baker visited Miss Thomas two or three days at Tracy.

About the middle of September, 1959, he returned to Tracy and told Miss Thomas that he was married but was getting a divorce. He asked her to go with him to Reno and to marry him after the divorce. She agreed and they left Tracy in his automobile. When they reached Sacramento, California, Baker suggested to her that she could make money for him by being a prostitute. They did not stop at Sacramento but drove on to Tiller, Oregon, where they stayed at his home.

Baker and Miss Thomas stayed in Tiller for three or four days and then drove in his automobile to Reno, Nevada, where they checked into a motel. She then went downtown and had her hair dyed platinum blonde, after which they drove to Elko. When they reached Elko, they went to Betty's D & D Club, arriving there about 3:00 o'clock A. M. After they entered the club Baker left Miss Thomas and went into another room with a girl who was present. When he returned he told Miss Thomas that Betty did not have any room for anybody, "but he knew they did because they were always needing girls."

The two then drove to a Joe Conforte's place in Wadsworth, Nevada, arriving there at 6:00 o'clock A. M. Baker told Miss Thomas he would see if they needed any girls, and went inside. When he returned to the automobile he told Miss Thomas to go inside with him. She did so and Baker introduced her to the maid who showed her to a room. Baker then left.

Miss Thomas worked as a prostitute in this house for four or five days, this being the first time she had done such work. She made two or three hundred dollars which she turned over to Baker when he returned at the end of this period.

Miss Thomas then went with Baker in his automboile to Winnemucca, Nevada, where she began working as a prostitute at Mickey's My Place bar. Baker then left. Four or five days later, Miss Thomas left this place and arranged to have two truck drivers take her to Sacramento. There she took a bus and returned to her sister's home in Tracy. Baker called for her a day or so later and took her to the Moonlight Ranch in Carson City, Nevada, where he arranged for her to work as a prostitute.

Four or five days later they left Carson City. Miss Thomas' testimony is confused as to what they did next. They may have driven directly to Peoria, Illinois. On the other hand they may have driven first to Caseyville, Illinois, where they picked up Baker's daughter at the house of his mother. If the latter is the case, they then took the girl to his father's home in Grant's Pass, Oregon, before going to Peoria. In either event, they reached Peoria about November 1, 1959. Baker arranged to have her work there as a prostitute in a house operated by one Pam Miller. Miss Thomas worked there until January, 1960, when she returned to Oregon.

Appellant's first two points on appeal relate to the testimony of Pam Miller. Testifying for the Government over the objection of Baker's counsel, she corroborated the testimony of Miss Thomas concerning the events which occurred in Peoria. Appellant argues that Pam Miller's testimony should have been excluded as "substantive evidence of an independent crime."

Testimony concerning events in Peoria tended to prove an independent crime, since the indictment charged only a transportation between Tiller, Oregon and Elko, Nevada. It is the general rule that on the trial of a person accused of crime, proof of a distinct, independent offense is inadmissible. **Tedesco v. United States**, 9 Cir., 118 F. 2d 737, 739-740.

But there are several exceptions to this rule, one being that proof of an independent crime may be produced to show the intent with which the alleged act was committed. **Bush v. United States**, 9 Cir., 267 F. 2d 483, 489; **Tedesco**, above, at page 740.

Appellant recognizes this exception and concedes that the testimony of Miss Thomas concerning the events which occurred in Peoria was admissible under it. But he draws the line at Pam Miller's testimony, arguing that hers was "substantive" in character.

In urging that Pam Miller's testimony was substantive in character, appellant seems to advance three independent arguments. One, which we shall first consider, is that it was introduced to prove the fact of the Tiller-Elko transportation rather than the purpose for which it was undertaken.

We perceive no reason for drawing such a distinction between the testimony of Miss Thomas and that of Pam Miller. It is true that Government counsel did not expressly state, at the time the evidence was received, that the purpose of Pam Miller's testimony was to establish purpose with regard to the Tiller-Elko transportation. But this is the only reasonable inference in view of the fact that her testimony did no more than corroborate that of Miss Thomas, which was concededly limited to that purpose. Moreover, during argument to the jury, counsel for the Government referred to evidence concerning Peoria only as tending to establish intent.

Appellant's second argument in this connection is that Pam Miller's testimony did not tend to prove anything about his general disposition to have Miss Thomas work as a prostitute, and that it was only offered to prove that Miss Thomas had worked for Pam Miller in Peoria. This effort to corroborate Miss Thomas' testimony by intro-

ducing evidence of a collateral matter, it is argued, tended to confuse the issues being tried, and the evidence should have been excluded as irrelevant.

If Pam Miller had testified only to the fact that Miss Thomas had worked for her in Peoria, this argument might have some merit.[1] But she testified that Miss Thomas and appellant came to her house in Peoria together. This evidence was relevant to appellant's purpose in the Tiller-Elko transportation. It directly concerned appellant's conduct, from which the jury could draw inferences concerning his mental state.

Appellant's third argument appears to be that Pam Miller's testimony, being cumulative of that given by Miss Thomas, strained to the breaking point the proper application of the "intent" exception.

No doubt the amount or character of evidence concerning independent crimes, tendered under the "intent" exception to the general rule can, under stated circumstances, be such as to require a trial court in the exercise of a sound discretion to call a halt. But under the circumstances of this case, the production of Pam Miller as an additional witness as to the Peoria episode does not seem unreasonable or unfair.[2] Moreover, it is unlikely that Baker was prejudiced thereby any more than he was already prejudiced by the undisputed and concededly admissible testimony of Miss Thomas concerning Baker's activities at Wadsworth, Winnemucca and Carson City, Nevada, and Peoria, Illinois.

---

[1] See *Minner v. United States*, 10 Cir., 57 F. 2d 506, 510. We need not decide whether under this assumed state of affairs a trial court's failure to exclude the testimony would be so prejudicial as to require the granting of a new trial.

[2] The trial court demonstrated its alertness to the problem when it questioned the Government's effort to produce similar testimony from a third witness. Reacting to the court's misgivings, the Government withdrew this witness.

The Court did not err in receiving the testimony of Pam Miller.

Appellant further argues, however, that if Pam Miller's testimony was admissible the jury should have been, but was not, instructed as to its limited purpose.

Such an instruction is proper and if the trial court is requested to give such an instruction it would be error to refuse. See **Tedesco v. United States**, 9 Cir., 118 F. 2d 737, 740.

But although appellant, under Rule 30, Federal Rules of Criminal Procedure, 18 U.S.C.A., had the right to file a written request for such an instruction, his then counsel did not do so.[3] Nor did counsel orally request that such an instruction be given. Moreover, he interposed no objection to the omission of such an instruction. Instead, trial counsel for appellant, when asked by the court before any instructions had been given, whether the instructions proposed to be given covered the points he had in mind, answered, "Yes, Your Honor." After all of the instructions had been given, counsel for appellant told the court, "The defendant has no exceptions."[4]

It is provided in Rule 30 that no party may assign as error any portion of the charge or omission therefrom "unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Therefore the failure to instruct as to the limited purpose of the testimony from Pam Miller may not be a ground for reversal here unless we notice the matter as a plain error

---

[3] On this appeal appellant is represented by different counsel.

[4] Counsel for appellant meant "objection." See Rule 30, referred to above. Under the Federal Rules of Criminal Procedure, "exceptions" are unnecessary. See Rule 51.

or defect affecting substantial rights, within the meaning of Rule 52 (b), Federal Rules of Criminal Procedure.

Appellant asks us to so notice the failure to give an instruction concerning the limited application to be given Pam Miller's testimony.

The issues of the case were relatively simple. Baker presented no defense other than to put the Government on its proof. The testimony of Miss Thomas concerning the intent with which Baker took her from Tiller, Oregon to Elko, Nevada, was not disputed.[5] Appellant makes no complaint of the failure to instruct the jury as to the limited application to be given Miss Thomas' testimony concerning events subsequent to her departure from Elko. Pam Miller's testimony, as noted above, did no more than corroborate that of Miss Thomas in this respect. The omission in question did not constitute a failure to instruct on an essential element of the crime.[6]

During his closing argument to the jury counsel for the Government made it clear that evidence concerning the Peoria transaction bore only on the matter of intent. The trial court instructed the jury that "(t)he defendant is not on trial for any act or conduct not alleged in the indictment."

Considering together all of these circumstances we are convinced that Baker's substantial rights were not affected by the failure to give the instruction under consideration. We therefore decline to notice such omission as a plain error or defect within the meaning of the Rule 52 (b),

---

[5] Nor was any of her other testimony. Appellant produced no witnesses other than to recall an agent of the Federal Bureau of Investigation who had testified for the Government.

[6] See *Barry v. United States*, D. C. Cir., 287 F. 2d 340, 341, where such an omission was involved.

and accordingly hold that it is not a ground for reversing the judgment under review.[7]

Appellant next argues that the district court erred because, in its instructions, the court assertedly failed to "hypothesize" the crime on the facts.

For the reasons stated above, our only inquiry here, and with regard to other questions concerning the instructions, to be discussed below, is whether plain error is involved.

We are not sure what appellant means by the words, "hypothesize" the crime or facts.

He may be referring to an asserted failure to instruct as to appellant's theory of the case. It is reversible error for a trial court to refuse, on request, to instruct as to a defendant's theory of the case, where the record contains evidentiary support for the theory.[8] But appellant had no theory of the case other than a denial of the charge, putting the Government on its proof. That theory was adequately presented when the court gave the usual instructions concerning the presumption of innocence and the necessity of the Government proving each element of the crime beyond a reasonable doubt. See **Hancock v. Commonwealth** (Ky.), 262 S. W. 2d 670, 671.

It follows that there was no error with regard to instructions on appellant's theory of the case, much less a plain error cognizable under Rule 52 (b).

---

[7] In so disposing of this contention we do not decide whether the plain error rule may or should in any event be applied where counsel for defendant has affirmatively advised the court, prior to the giving of any instructions, that the instructions proposed to be given by the court cover all the points counsel had in mind.

[8] *Lutfy v. United States*, 9 Cir., 198 F. 2d 760; *Levine v. United States*, D. C. Cir., 261 F. 2d 747.

But, in complaining of the trial court's failure to "hypothesize" the crime or the facts, appellant may be arguing that it was incumbent upon the court, in its instruction, to make specific reference to the evidence, followed by instructions as to the law to be applied according to whether the jury finds such evidence to be true or false.

The extent to which the instructions on the law are to be related to hypothetical facts which the jury may or may not find to be established, rests in the sound discretion of the trial court. We find no abuse of discretion in this regard and certainly no plain error.

Appellant contends that the court erred in assertedly charging the jury, in substance, that it was reasonable for them to infer defendant's intent by what he did, as he was presumed to intend the natural consequences of his acts. The instruction in question is set out in the margin.[9]

Where, as here, the intent of the accused is an ingredient of the crime charged, its existence is a question of fact for the jury. It is error for the trial court to withdraw or prejudge such an issue by instructing the jury that the law raises a conclusive presumption of intent. **Morissette v. United States**, 342 U. S. 246, 275.

Moreover, where intent is a necessary element of the crime, it is error for the court to instruct the jury that it may, but is not required to, infer the requisite intent from an isolated fact. There can be no presumption as to intention which would permit the jury to make an as-

---

[9] "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

sumption which all the evidence considered together does not logically establish. **Morissette v. United States,** at page 275.[10]

In the case before us the court did not, as in **Morissette,** instruct that unlawful intent must be conclusively presumed from an isolated fact established by the evidence. Nor was the jury told that it might presume unlawful intent from any isolated fact. The court in fact made no reference to a presumption relating to intent but, in the challenged instruction, spoke only of permissible inferences. As to the latter, the instruction did not, when considered in context with all of the instructions, advise that an inference of unlawful intent could be drawn from any isolated fact, or that such an inference could be drawn from an assumption which, we can say, all the evidence considered together does not logically establish.

The intent which must be proved as an essential element of the crime defined in 18 U. S. C., § 2421, is an intent that the female transported by the accused in interstate commerce shall, after such transportation, engage in the charged immoral conduct. **Dunn v. United States,** 10 Cir., 190 F. 2d 496. This intent may be shown by circumstantial evidence. **Hardie v. United States,** 5 Cir., 208 F. 2d 694.

Among the circumstances which may be considered in determining whether such an intent existed, all of which were present in this case, are that there were other similar activities by the accused, showing a pattern of conduct,

---

[10] See also, *Bloch v. United States,* 9 Cir., 221 F. 2d 786, 788-789; *Wardlaw v. United States,* 5 Cir., 203 F. 2d 884, 887. In the latter case, involving a charge of wilfully and knowingly attempting to defeat and evade income taxes, the court said:

> ". . . The intent involved in this offense is not inherent in the act itself, but is a specific intent involving bad purpose and evil motive and that specific intent must be proved by or clearly inferred from the evidence."

Bush v. United States, 9 Cir., 267 F. 2d 483; that, at the end of the journey the female was taken by the accused to a house of prostitution, **Suslak v. United States**, 9 Cir., 213 F. 2d 913; and that the accused received money derived from the female's activity as a prostitute. **Hardie v. United States**, 5 Cir., 208 F. 2d 694. In addition there was here the undisputed testimony of Miss Thomas that he proposed that she engage in prostitution, and that he made specific arrangements for such activities at several different establishments.

Neither at the trial nor in this court has appellant suggested any lawful motive in transporting Miss Thomas from Tiller, Oregon to Elko, Nevada. In view of the circumstances noted above, all of which are relevant in determining intent, the evidence tending to show unlawful intent was most compelling and entirely undisputed. We conclude that the questioned instruction was correct as far as it went. While the instruction could have been more definitive, there was no request in this direction nor any objection to the form given, and any deficiency in this regard did not constitute plain error under Rule 52 (b).

Appellant contends that, in several other respects, the court in its instructions failed to define the issues and elements charged in the indictment and the individual terms used therein. He also contends that in at least one other respect the instructions inaccurately defined the terms used in the indictment. We have examined each of these matters and find no error or defect affecting appellant's substantial rights, within the meaning of the plain error rule.

Affirmed.

(Endorsed) Opinion Filed November 20, 1962.

Frank H. Schmid, Clerk.

Judgment.

United States Court of Appeals
For the Ninth Circuit.

James Richard Baker,
Appellant,
vs.
United States of America,
Appellee.
No. 17,937.

Appeal from the United States District Court for the District of Nevada.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 20, 1962.